RECOVERY ALLOWED FOR MENTAL ANGUISH UPON INFORMATION RECEIVED FROM PHYSICIAN

Ferrara v. Galluchio,
5 N.Y.2d 16, 152 N.E.2d 249 (1958)

Plaintiff's shoulder became sore and blistered as a result of a series of x-ray treatments from defendant physicians. One of the sores lasted as long as two years after the treatments and the shoulder was left with a permanently marginated area of skin. A dermatologist advised the plaintiff that the shoulder should be checked every six months since the burned area might become cancerous. As a result of this admonition, plaintiff suffered severe mental anguish. There was testimony of a neuro-psychiatrist that plaintiff was suffering from a severe cancerphobia, *i.e.*, the phobic apprehension that she would ultimately develop cancer, and that she might have permanent symptoms of anxiety. Leave to appeal was granted solely for the purpose of passing on the propriety of the jury's award of $15,000 for mental anguish flowing from the cancerphobia. The court affirmed by a four to three decision.[1]

This is the first case in which recovery has been allowed purely for mental anguish resulting from *information* received from a physician who treated the original negligently-caused injury. Generally, one suffering from injuries due to the negligence of another may recover for mental distress and anguish which directly and as a natural consequence flow from the physical injury.[2] There appears to be no definitely accepted standard as to how this general rule should be applied to anxiety over possible future consequences of the physical injury.[3] However, the weight of authority does allow recovery for reasonable fear of future illness or death as a result of the injury.[4]

In the instant case, the anxiety was induced by fear of cancer, a disease commonly regarded as incurable. The general publicity as to warnings of cancer symptoms has made the layman so conscious of this

---

[1] Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249 (1958).

[2] 25 C.J.S. *Damages* § 63 (1941); 15 AM. JUR. *Damages* § 176 (1938); 1 SEDGWICK, DAMAGES 62 (9th ed. 1912).

[3] See 25 C.J.S. *Damages* § 70 (1941); 15 AM. JUR. *Damages* § 188 (1938).

[4] Fehely v. Senders, 170 Ore. 457, 135 P.2d 283 (1943); Elliot v. Arrowsmith, 149 Wash. 631, 272 Pac. 32 (1928). See Halloran v. New England Telephone & Telegraph Co., 95 Vt. 273, 115 Atl. 143 (1921) (knowledge that condition of heart would not permit operation for pre-existing cancer); Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152 (1905) (fear of death from swallowing glass); Butts v. National Exchange Bank, 99 Mo. App. 168, 72 S.W. 1083 (1903) (apprehension of blood poisoning); Walker v. Boston & Maine R.R., 71 N.H. 271, 51 Atl. 918 (1902) (apprehension of insanity); Warner v. Chamberlain, 30 Atl. 638 (Del. 1884) (fear of hydrophobia from dog bite); Godeau v. Blood, 52 Vt. 251 (1880) (apprehension of poison from dog bite). *Contra,* Lake Erie & Western R.R. v. Johnson, 191 Ind. 479, 133 N.E. 732 (1922); St. Louis I.M. & S. Ry. v. Buckner, 89 Ark. 58, 115 S.W. 923 (1909).

disease that every reasonable person is aware of its danger. The fear of cancer is certainly a reasonable consequence of an injury that does not heal over an extended period of time.

The questions, then, are: What effect should the statement of the dermatologist who treats the injury, thereby inducing a fear which would be reasonable even without the statement, have on the measure of damages? Should it make any difference that the fear would not reasonably have developed were it not for the dermatologist's statement?

It is generally agreed that original wrongdoers are liable for aggravation of injuries and mental suffering flowing therefrom, when caused by the negligence of physicians in treating the original injuries, since the treatment by the physician and his negligence are the natural consequences of the wrongful act.[5] In the instant case, there was no question of negligence by the dermatologist; he made an apparently reasonable statement. There was aggravation of *mental* injuries only, not of *physical* injuries. If reasonable fear of future illness or death as a result of the injury is a basis for awarding damages and if treatment by a physician is the natural consequence of the injury, then the *absence* of intervening negligence by the dermatologist affords additional justification for the allowance of recovery for the mental anguish. The absence of aggravation of the physical injury should be relevant only in determining the genuineness of the mental anguish.

It seems to follow, also, that if the original tortfeasor is liable for intervening negligence of a physician, he should be liable for the mental anguish even if it would not have resulted but for the dermatologist's statement. It would be anomalous to hold the original wrongdoer liable for the dermatologist's intervening negligence and excuse him from the consequences of the dermatologist's due care.

The dissent felt that, as a matter of policy, a mere statement by a physician as to possible future consequences of the injury, which results in mental suffering to the plaintiff, should not be a basis for recovery of damages from the original wrongdoer because the recovery may depend upon the subjective mind of the plaintiff and speculation by the physician. This concern over the difficulty in determining the validity of the mental anguish is a common one. However, the law has progressed to the point where courts no longer feel incompetent to deal with this problem. In this case the court found a "guarantee of genuineness [of the cancerphobia] in the circumstances of the case." So long as there is satisfactory evidence as to the existence of mental anguish, courts will deal with the problem, and rightly so.[6]

Norman L. Schwartz

[5] Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934). Annot., 8 A.L.R. 507 (1920), 39 A.L.R. 1268 (1925), 126 A.L.R. 912 (1940).

[6] See PROSSER, TORTS § 37 (2d ed. 1955).